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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 215.

NORTHERN OHIO TELEPHONE COMPANY,
Petitioner,

vs.

HOWARD R. WARD,
Respondent.

BRIEF IN OPPOSITION
To Petition For Writ of Certiorari.

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BRIEF IN OPPOSITION
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RESTATEMENT OF QUESTION PRESENTED.

The question presented for review is as follows:

Should this Court review the decision of the Court of Appeals holding that there is a question over which the Federal Courts have jurisdiction when a telephone company having all of its facilities located in one state wrongfully fails and refuses to furnish a radio station in that same state telephone lines for broadcast purposes?

RESTATEMENT OF THE CASE.

Respondent accepts Petitioner's statement of the case with two notable exceptions.

Petitioner, Northern Ohio Telephone Company, contends it is involved in interstate commerce solely as a "connecting carrier" through physical connection with the facilities of other telephone companies. However, Petitioner, by furnishing wires for radio broadcasting to the

Respondent, also became involved in interstate commerce as a link in the radio broadcast chain.

Petitioner claims it is and has been deemed a "non-subject" company under the Federal Communications Act of 1934 by the Federal Communications Commission. The basis of this claim is a letter to Petitioner from the FCC the sole purpose of which was to request the voluntary submission of certain data for the FCC yearbook. In this letter Petitioner is incidentally described as a "non-subject company." There is no indication in the record of this case that the FCC was ever made aware of the use of Petitioner's telephone lines in radio broadcasting nor any indication that the FCC found Petitioner was or was not subject to the Communications Act of 1934 in view of such use.

STATEMENT.

It is submitted this case presents no questions that call for the granting of a writ of certiorari. The decision of the Court of Appeals is not in conflict with the decision of any other Court of Appeals, it is not in conflict with decisions of this Court, and no question of federal law is presented which should be settled by this Court.

ARGUMENT.

I. The Court of Appeals Correctly Held That a Federal Question is Presented When a Telephone Company Which Has Its Facilities in One State Wrongfully Refuses to Furnish a Radio Station in That State Telephone Lines For Broadcast Purposes.

Jurisdiction in this case is predicated on the existence of a federal question within the meaning of the Federal Judicial Code, there being no diversity of citizenship.

Title 28, U. S. Code, Section 1337 provides:

> "The District Court shall have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce * * *."

The Act of Congress upon which the Court of Appeals predicated its decision that the Federal Courts have jurisdiction is the Federal Communications Act of 1934, Title 47, U. S. Code. Petitioner's claim that it is not subject to the damage and enforcement procedure provisions of Sections 206 and 207 of Title 47 (Petitioner's Appendix, page 31) was rejected by the Court of Appeals, the Court stating (Petitioner's Appendix 40):

> "All of the provisions of the Act, as well as the subject matter with which it is concerned, regarding the duties and liabilities of such a carrier as appellee telephone company, would be futile without the remedial provisions setting forth a right to damages for violation thereof and the method of enforcing such right. It would be unreasonable to hold that appellee company is subject to the duties and liabilities set forth in the statute but that it is not subject to the provisions for enforcing the rights which the company may see fit to violate; and we see no reason to conclude that, while appellee company is subject to Sections 201-205, inclusive, of the Act, it is not subject to Sections 206-207, inclusive."

In the enacting of the Communications Act of 1934 Congress legislated that radio broadcasting is a matter of Federal concern exclusively. This Court, lower Federal Courts, and the Federal Communications Commission have uniformly held that radio broadcasting is a matter within the exclusive jurisdiction of the Federal Government.

In *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266 (1933), this Court recognized the national scope of radio broadcasting stating:

> "No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities."

In *Fisher's Blend Station, Inc. v. Tax Commission of Washington*, 297 U. S. 650 (1936), a case involving a question as to whether or not the State of Washington had a right to impose a state occupation tax on radio stations, this Court again enunciated the principle that radio broadcasting is matter of Federal concern stating:

> "By its very nature broadcasting transcends state lines and is national in its scope and importance, characteristics which bring it within the purpose and protection and subject it to the control of the Commerce clause * * *."

In *Didrickson v. Federal Communications Commission*, 254 Fed. (2d) 354 (1958), interference with broadcast equipment by a person on strike was deemed to be a matter of Federal concern and Federal jurisdiction was recognized.

The Federal Communications Commission has specifically held that the furnishing of telephone lines to a radio station for broadcast purposes is a matter within the exclusive jurisdiction of the Federal Government.

Strikingly similar to the instant case is the case of *In Re: Capital City Telephone Company*, 3 FCC Reports 189 (1936). In this case, the Capital City Telephone Company, located solely in the State of Missouri, leased telephone lines to a radio station within the State of Missouri. The company admitted that it was subject to the provisions of Sections 201 to 205 of Title 47. The Commission in its decision stated, pages 194 and 195:

> "Congress was cognizant of the fact that wires were used in connection with broadcasting. The intention of Congress to clothe the Federal Communications Commission with jurisdiction over charges and services for wires used in radio communication is evidenced by Section 202(b) which reads: 'Charges or services whenever referred to in this Act, include charges for or services in connection with the use of wires in chain broadcasting or incidental to radio communication of any kind.'
>
> "The fact that the wires used to carry the program from the microphone to the transmitter may be confined to a single state does not mean that the wires are not used in interstate communication. The contract or leasing arrangement may be for a wire service which begins and ends within a single state. *The complete transmission, however, is an interstate communication and is therefore subject to legislation by Congress under the Commerce Clause* * * *. (Emphasis supplied.)
>
> "In view of the express provisions of the Communications Act relative to the use of wires in connection with broadcasting it is indisputable that Congress has legislated on that question. It is a well established rule of constitutional interpretation that when Congress has legislated on a subject which is within its jurisdiction such legislation is exclusive and the power therein granted by Congress is exclusive of all other powers * * *.

"The interstate communication of a broadcasting company begins at the microphone, passes over the wires to the transmitter, and then through the ether, constituting a continuous interstate communication, which, because of its very nature, must be subject to federal regulations * * *.

"*This Commission has exclusive regulatory jurisdiction over wires and wire service furnished by a telephone carrier to a radio broadcasting station even though such wires do not cross state or national boundaries.*" (Emphasis supplied.)

In the *Capital City* case as in this case the telephone company had its facilities all in one state and furnished wires for broadcasting purposes to a radio station located in the same state. The Commission found there that for this purpose—the furnishing of broadcast lines—the telephone company was in Interstate Commerce and subject to Federal Law even though it might be a "connecting carrier" for all other purposes and as such subject only to certain provisions of the Communications Act. It is thus clear that a federal question is presented by the petition and that the Federal District Court has jurisdiction under Section 1337, Title 28, U. S. Code. The decision of the Court of Appeals here is squarely in line with court and administrative precedents. No question on this point is presented that calls for review by this Court.

II. The Court of Appeals Correctly Held That Petitioner Telephone Company Has Duties Under Sections 201-205 of Title 47, Which May Be Enforced Under Sections 206-207.

By express provision (Section 152(b) of Title 47), a connecting carrier is subject to Sections 201-205 of the Act, except where excluded therefrom by specific language. Petitioner does not dispute this. As the Court of

Appeals recognized, Petitioner's duties under Sections 201-205 become meaningless unless a remedy for enforcement is available. Petitioner argues that Sections 206-207 apply only to "common carriers" and not to "connecting carriers." Petitioner ignores the fact that by statutory definition a "connecting carrier" under Section 152(u) is a type of "carrier" or "common carrier" under Section 152 (h).

Petitioner's reasoning ignores not only the express language of the statute, but the overall structure and meaning of the Communications Act.

Part 2 of the Act, Sections 201-222 is entitled "Common Carriers." All of these sections refer to "common carriers" or "carriers" throughout and the language is specific that the words "common carriers" includes "connecting carrier" unless "connecting carrier" is expressly excluded by specific language. There is no such language in Sections 206 and 207; hence, Sections 206 and 207, using only the term "common carrier," should and do apply to Petitioner as the Court of Appeals correctly held.

The applicability of Sections 206 and 207 to the Petitioner is required in order to give effect to the intent of Congress and to give consistent and meaningful interpretation to the Act as a whole. Sections 201-205 prescribe duties incumbent upon Petitioner where it is involved in radio broadcasting, but do not themselves provide any civil sanctions. Sections 202, 203 and 205 contain only criminal penalties for the violation of the duties prescribed therein. Section 201 requiring the furnishing of communication service on reasonable request would be completely without means of enforcement unless Sections 206 or 207 were held to apply, since it contains no sanction civil or criminal. The Court of Appeals rightly found it unreasonable to hold that Congress had committed a vain

act making Petitioner subject to the duties prescribed in Sections 201-205 but not making it subject to the sections enforcing these duties.

If Section 207 does not apply to Petitioner then Respondent radio station could not file a complaint with the Federal Communications Commission against Petitioner for a violation of the provisions of Sections 201-205 because the right to bring a complaint before the FCC is found in Section 207. This strange result could not have been intended by Congress as the Court of Appeals correctly held.

III. The Decision of the Court of Appeals Is Consistent With Administrative Interpretations.

In the *Capital City Telephone Company* case (*supra*, page 5) the FCC recognized that the supplying of broadcast lines to a radio station is a matter for Federal jurisdiction. This facet of the telephone company's operation was deemed exclusively a matter of Federal concern. The existence of this facet of the telephone company's operation did not change the recogniton of the fact that the telephone company was otherwise a "connecting carrier."

The fact that a telephone company is a connecting carrier in no way removes it from the exclusive regulatory jurisdiction of the FCC with regard to those wire services which it furnishes or refuses to furnish to a radio broadcasting station.

None of the cases cited by Petitioner in Part II of its argument in any way contradicts the foregoing proposition. Two of the cases cited by Petitioner in fact expressly support it. In both *Jamestown Telephone Corporation* (Petitioner's Brief, p. 18) and *Northwest Telephone Company* (Petitioner's Brief, p. 19) a telephone company with its facilities physically located all in one state was held

to be a connecting carrier in each case, but in each case the Commission said that it had jurisdiction over wires furnished to the radio station for broadcast purposes.

The case of *In The Matter of Classification of Telephone Companies* (Petitioner's Brief, p. 16) is not in point. It contains no reference whatsoever to radio broadcasting or the furnishing of broadcast lines by telephone company. The issue in this case was not present there.

Petitioner's contention that the decision of the Court of Appeals is in conflict with long standing administrative interpretations is not sound. Petitoner's contention is based on its failure to recognize that it may be regulated by two different agencies for different facets of its operation.

At such time as Petitioner becomes involved in supplying wires for radio broadcast purposes it enters interstate commerce and in regard to this interstate function becomes subject to the exclusive regulatory jurisdiction of the FCC. In regard to the bulk of its telephone communication services which are intrastate, it would remain subject to the PUCO. The holding of the Court of Appeals to this effect was thus entirely consistent with prior FCC administrative rulings in the *Capital City, Jamestown Telephone Corporation* and *Northwest Telephone Company* cases. There was no reversal of administrative interpretation and no question of importance is raised that needs consideration by this Court.

IV. The Doctrine of Primary Jurisdiction Affords No Basis For Certiorari to This Court in This Case.

Petitioner lays great emphasis on the claim that this Court should grant certiorari because of the failure of the Court of Appeals to apply the doctrine of primary jurisdiction. It is submitted that the doctrine of primary jurisdiction is not applicable to this case, but even if it were appli-

cable, it is a doctrine to be applied by the Trial Court on specific issues and not a matter that should be considered by this Court on a petition for certiorari.

Respondent's petition in this case sets forth eight causes of action. Few, if any, of these claims raise issues that should be considered by the FCC. Most are damage claims no different than others regularly handled in Federal Courts. If the doctrine of primary jurisdiction were properly applicable it would be applicable only to certain limited issues.

The doctrine of primary jurisdiction is not a doctrine calling for the dismissal of an action, but merely the suspension of the action in the Trial Court while certain administrative determinations are made. The doctrine is not a denial of jurisdiction of the Federal District Court to hear the case. In fact, it is logically necessary for the Court to have jurisdiction in order to invoke the doctrine. This is clearly set forth by this Court in *United States v. Western PR Company*, 352 U. S. 59, cited by Petitioner (Petitioner's Brief, p. 10):

> "* * * primary jurisdiction on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special confidence of an administrative body; in such a case, the judicial process *is suspended* pending referral of such issues to the administrative body for its views." (Emphasis supplied.)

Even if the doctrine were to be found properly applicable to certain issues in this case, any determination by this Court upon certiorari of the need to invoke the doctrine of primary jurisdiction would be premature. This case has barely begun in the District Court arising on a

motion to dismiss the complaint. There has been no argument on the applicability of the doctrine of primary jurisdiction to any aspects of the various claims made in the petition, since there has been no hearing in the District Court and since this question of primary jurisdiction was never raised by Petitioner in the District Court nor in the Court of Appeals, being raised for the first time in Petitioner's brief here. There has been no consideration of the mechanics of applying the doctrine to this case which could raise problems. The fact that Respondent moved his radio station from the area served by Petitioner as a result of Petitioner's conduct so that we now have an issue solely of past conduct and we are not concerned with future regulation, is a matter of major importance in a Trial Court's exercise of its discretion and judgment as to whether or not to submit any issues in this case to the FCC. Also, this case raises other issues not considered on this appeal.

Certiorari is not the procedural method for dealing directly with the parties in the resolution of issues involved here. Preliminary questions and factual issues involved in this case containing nothing of broad national concern should not be a burden of this Court.

The doctrine of primary jurisdiction is not an issue in this case calling for the granting of a writ of certiorari.

CONCLUSION.

Respondent contends that the decision of the Court of Appeals was clearly correct and that this case raises no issue calling for the granting of a writ of certiorari. Respondent submits that the Court of Appeals correctly ruled that Respondent could bring action under Sections 206-207 of Title 47 to enforce rights under Sections 201-205 violated by Petitioner; that radio broadcasting by Con-

gressional Act and by judicial and administrative interpretation is a matter exclusively within the jurisdiction of the Federal Government. Respondent asserts further that the applicability of the doctrine of primary jurisdiction to the specific issues of this case should not be a burden of this Court on certiorari. Respondent concludes that this case presents no conflict with any decision of this Court or of any other Court of Appeals, or with any District Court or administrative decision, and it presents no issue of law for which this Court should grant certiorari in this case.

Respectfully submitted,

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